

**M&M Electric, Inc. and International Brotherhood of Electrical Workers, Local 640, AFL-CIO.** Cases 28-CA-16259 and 28-CA-16259-2

June 20, 2001

**DECISION AND ORDER**

**BY CHAIRMAN HURTGEN AND MEMBERS  
LIEBMAN  
AND WALSH**

On September 22, 2000, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusion<sup>1</sup> and to adopt the recommended Order.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge, and the complaint is dismissed.

*William Mabry, III, Esq.* and *Paul Irving, Esq.*, for the General Counsel.

*Guy Knoller, Esq.*, of Phoenix, Arizona, for the Respondent.

*Albert Charles Gross, Organizer*, of Phoenix, Arizona, for the Union.

**DECISION**

**STATEMENT OF THE CASE**

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to a notice of hearing in this matter was held before me in Phoenix, Arizona, on May 30 and 31, and June 1 and 2, 2000. The charges in the captioned cases were filed on January 3 and 25, 2000, by International Brotherhood of Electrical Workers, Local 640, AFL-CIO (Union). Both charges were amended thereafter. On February 29, 2000, the Regional Director for Region 28 of the National Labor Relations Board (Board) issued an order consolidating cases, consolidated complaint, and notice of hearing alleging violations by M&M Electric, Inc. (Respondent) of Section 8(a)(1) and (3) of the National Labor Relations Act (Act). The Respondent, in its answer to the complaint, duly filed, denies that it has violated the Act as alleged.

<sup>1</sup> The judge did not separately discuss the General Counsel's allegation that the Respondent unlawfully instituted a new application procedure because of the Union's organizing efforts. The General Counsel excepted to the judge's failure to find the alleged violation. We find insufficient evidence to support the allegation.

There are no exceptions to the judge's recommended dismissal of the allegations that the Respondent violated Sec. 8(a)(3) of the National Labor Relations Act.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel (General Counsel), and counsel for the Respondent. On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

**FINDINGS OF FACT**

**I. JURISDICTION**

The Respondent is engaged in the construction of electrical systems with its principal office and place of business located in Phoenix, Arizona. In the course and conduct of its business operations during the 12-month period ending January 3, 2000, the Respondent has performed services in the State of Arizona valued in excess of \$50,000 for AT&T Corporation, an enterprise directly engaged in interstate commerce. It is admitted and I find that the Respondent is and at all material times has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

**II. THE LABOR ORGANIZATION INVOLVED**

It is admitted and I find that at all material times the Union is and has been a labor organization within the meaning of Section 2(5) of the Act.

**III. ALLEGED UNFAIR LABOR PRACTICES**

*A. The Facts*

The Respondent is an electrical contractor and at times material here has employed as many as 50 to 60 electricians at an AT&T jobsite located in Mesa, Arizona. The job is currently ongoing. The Respondent's project manager at that jobsite is Rick Carter. Carter does not hire electricians; rather they are hired by personnel in the main office and sent to the jobsite. The Respondent's electrical superintendent is Charles Van Hook. Bob Orsburn, who reports to Van Hook, is a foreman.<sup>1</sup> Crew leaders, sometimes also called foremen, who report to Orsburn, are Andrew Perata, Mike Viscardi, Bryan Peterson, and James Zoske.

Carter testified that on January 5<sup>2</sup> he laid off six electricians. Prior to that time the Respondent had both a day shift and a night shift. Carter testified as follows:

We had been working day shift and a night shift, trying to get a completion date for—I believe it was the 7th of January. The second phase was supposed to follow immediately after that, but it was delayed. We had to combine the day shift and the night shift back together to—we didn't need to run them anymore because the Phase I was ended.

Electrical Superintendent Van Hook corroborated Carter's testimony, and stated that the blueprints for the second phase of

<sup>1</sup> The alleged supervisory status of Orsburn is an issue in this proceeding. According to the testimony of both Carter and Orsburn, Orsburn would delegate who worked where and who did what, but did not have the authority to discipline employees or grant time off; such matters were referred to either Van Hook or Carter.

<sup>2</sup> All January dates or time periods are within 2000, and all other dates or time periods are within 1999 unless otherwise specified.

the project had not yet been approved by the city and since “the second phase was not starting . . . we had to let some people go. I couldn’t just have them standing around.” Thus, beginning on January 6 or 7 there was only a day shift.

This necessitated a reduction in the number of electricians that would be needed at that time. Carter, with input from Van Hook and, to a lesser extent from other foremen or leadmen, selected six employees to be laid off.

Carter and Van Hook testified that the selection of the employees to be laid off was dictated by their efficiency, productivity, ability to perform the work in a timely manner, and other considerations. Michael Viscardi, a foreman, who according to Carter was more like a “crew leader,” was knowledgeable and a good workman but was selected for layoff because he had a problem with people skills and could not motivate his people to do the job; there were several complaints about him but one electrician in particular threatened to quit if she had to continue working under Viscardi. Anthony Dodge, who was employed on December 29, was laid off because he was very slow and was found not working and just “sitting there” in a space underneath the computer floor doing nothing for 10 or 15 minutes. Mike Benson was not dependable and was laid off for failure to show up; he had not come to work on either January 4 or 5. Glen Smith was the least senior person, had failed to show up for work on several occasions, and was not that efficient of a worker; Carter simply felt that he was expendable. Jim Nobles was very slow and his efficiency did not seem to justify the amount of money that he was being paid as his application indicated that he had more experience than was reflected by his work. Jim Chamberlain was laid off because Van Hook had reported to Carter that Chamberlain, who should have been working at the time, had wandered outside his work area, entered the trailer office, and was “sort of looking around” on Van Hook’s desk and, apparently after being discovered, proffered the excuse that he just wanted to offer Van Hook some cookies; Carter believed that for some unknown reason he was just snooping around.<sup>3</sup>

Carter and Van Hook testified that they did not know whether any of these employees were union organizers, members, or supporters. None of the employees were told why they were selected for layoff but were simply told that a layoff was necessary because the Respondent was combining two shifts and was cutting back on the job force. Carter testified that probably within a week after these layoffs the Respondent again commenced to hire new electricians, but Carter did not call back any of the six aforementioned individuals because of their work-related or other deficiencies.

About mid-January certain union employees began wearing union T-shirts and union hats to work. The employees were James Zoske, William Hansen, Dominic Paz, Christopher Luce, Donald Keith, and Dennison Tsosie. On January 31 the Union

engaged in picketing the Respondent, and it is alleged in the complaint that this picketing constitutes an unfair labor practice strike.

Michael Viscardi applied on December 28 and began working on December 29. Viscardi testified that because the supervisory hierarchy seemed to be disorganized he did not know who his immediate supervisor was. After a short time he was made a foreman, and had about 15 electricians working under him. There were a total of about 12 electricians on the job who worked for the Respondent as employees of Crown Technical, an employment agency. About six of these employees worked on Viscardi’s crew. Viscardi testified that “Crown Tech’s were basically rent-a-drunks that were very inefficient, incompetent, showed to the job with no tools, couldn’t perform their tasks. There was only, I think, one, maybe two Crown Temps that I knew of that was actually a pretty good hand.” Viscardi acknowledged that one of these Crown Technical electricians, Lisa Lee, complained to her supervisor that Viscardi was “riding her ass.” According to Viscardi, he was “keeping on” Lee because Orsburn told him to; however, he was not “keeping on the others because basically everybody else was doing their job except for Lisa Lee.”<sup>4</sup> Viscardi testified that the day before he was laid off Lee was moved to a different crew so that Viscardi would not have to deal with her because, according to Viscardi, “they needed all the people they had to get the job done.”

Lisa Lee was employed by Crown Technical in December and worked for the Respondent until about mid-January. She had worked for the Respondent, apparently through Crown Technical, on a previous occasion. Lee corroborated the testimony of Carter. She testified that she worked under Mike Viscardi for about a week. She complained to Carter that she thought Viscardi “was a jerk,” that he was arrogant, and that she did not like his attitude or the way he talked to her, and that she “didn’t want to work around him, near him or by him.” She asked Carter to put her somewhere else so that she could just do her job. Lee also testified that she worked around Orsburn and Perata and, contrary to the testimony of other witnesses, *infra*, never heard either of them refer to any of the people who had been laid off as union pukes or punks, or say anything of a derogatory nature about them.

Jim Nobles began working for the Respondent on December 30. Nobles testified that on the night of January 5 he overheard a conversation between Van Hook, Zoske,<sup>5</sup> and Orsburn, who, according to Nobles, was “one of the sub foremen.” One of these individuals said that “they were going to have a layoff that night and they were getting rid of some union people,” and then named Nobles and Chamberlain, who were on the night shift, and said that Viscardi, who was on the day shift, had already been laid off. Later that evening Zoske summoned Nobles and Chamberlain into the trailer and Van Hook laid them off. Nobles asked how his work performance was, and Van Hook said, according to Nobles, “Your work performance was fine. We’re laying off.” Nobles testified that the foremen, including Zoske and Orsburn, did tell him that there were union

<sup>3</sup> Electrical Superintendent Charles Van Hook generally corroborated Carter’s testimony, and regarding Chamberlain, testified that: “I didn’t care that he offered me cookies or that he was in my trailer, not that he had a reason to be there. But he was there during normal work hours, not on break time, and I had seen him before walking around making multiple trips to the J-Johns [porta-toilets] and stuff like that when other employees weren’t doing it that often.”

<sup>4</sup> This latter testimony conflicts with Viscardi’s earlier testimony that only perhaps one or two Crown Tech employees were satisfactory.

<sup>5</sup> Nobles acknowledged that Zoske was one of his “union brothers.”

people on the job and they knew who they were, but they did not mention any names to Nobles. Thus, according to Nobles, Orsburn would state, “[W]e know we have a few union members on the job”; however Orsburn “wouldn’t state any kind of opinion” or elaborate on the matter.

Jim Chamberlain was hired on December 21 and began working on December 22. On January 5 Van Hook told both Chamberlain and Nobles that they were “letting us go because of lack of work. They were going back to one shift during the day and they were cutting men down. They were downsizing the jobsite.” Chamberlain did not corroborate Nobles testimony regarding Nobles’ alleged conversation with Van Hook regarding the quality of Nobles’ work performance, and did not rebut Carter’s testimony that Chamberlain was observed snooping around the job trailer. Chamberlain testified that while he was employed he did not hear anyone referring to union people as “union pukes,” nor did he hear anyone referring to Al Gross in a derogatory way. Rather, according to Chamberlain, he did overhear the superintendent of Caliente Construction, apparently the general contractor on the project, “complaining about union pukes on the job.”

Al Gross is an organizer for the Union. Gross acknowledged that he was in charge of the Union’s targeting of the Respondent and that he organized the salting activity and directed the various union members to apply for jobs, overtly or covertly, at times material herein. On about December 29,<sup>6</sup> Gross and Roy Hamilton, Sr. enter the Respondent’s premises. Gross testified that Glen Myrick, the Respondent’s owner, approached them and Gross handed Myrick a union T-shirt, a union contract, an agreement book or “New Members Kit,” and his business card, and asked him for an employment application. According to Gross, Myrick did not give him an application immediately. Shortly thereafter someone whom Gross identified as Myrick’s brother joined the conversation and said, “We’re not hiring.” There was discussion about the Union. It was not until about 15 minutes later that Gross again requested an application and said he was a bona fide applicant for employment. This time Myrick, who was hesitant, handed him an employment application and Gross began filling it out while the conversation continued. The conversation lasted for approximately 45 minutes. At the end of the conversation Gross handed the application back to Myrick and asked if it was satisfactory. Myrick said, according to Gross, “[Y]es it was because I’m not going to look at it.” Gross asked how long he would keep the application on file, and Myrick replied, “[F]orever.”

On cross-examination Gross testified that when he and Hamilton walked in he asked for an application. Myrick said that he would not give Gross an application and asked whether the Union still used violent attacks against nonunion contractors. Myrick, according to Gross, was disrespectful and at some point asked Gross where his gun was. Gross did not think this was funny and took out his pen and said, “This is my gun.” Gross said he was a qualified and highly experienced electrician looking for a job. However, during the first 10 or 15 min-

utes of the conversation, according to Gross, he was not emphasizing the employment application in any way. Rather, the discussion was centered on union-related matters. At some point Gross told Myrick that he “wanted to go out there and organize his company because some of my union brothers were already out there,” and mentioned that about 15 union members were already on the job. During a portion of the conversation, according to Gross, Myrick and Hamilton were talking “about some old times with different members and what have you,” and were just “chewing the fat” about old friends and common acquaintances. There was discussion about the different types of letters of assent and the difference between them, and Myrick, according to Gross, was just listening and being very receptive and cordial. Gross offered Myrick a 6-month union contract and told him that if he didn’t enjoy the benefits of the agreement within that window of opportunity he could withdraw his letter of assent. Myrick asked some questions about the “intermediate program” which is similar to but distinct from the apprenticeship program. Market recovery funding was discussed. By the very end of the conversation Gross had completed filling out the application, and it was at that point that Myrick said, according to Gross, that he did not intend to even look at the application and would keep it on file “forever.”

Hamilton, an organizer who accompanied Gross in order to witness the conversation, testified that the conversation lasted about a half hour. Gross began the conversation by saying that he would like to give Myrick the opportunity to join the Union and become a signatory contractor and would also like to apply for a job. Myrick replied that he wasn’t hiring, and Gross said he was a good electrician with a lot of experience. However, during some point in the conversation Myrick did give Gross an application, and Gross filled it out during the continuing discussion about other union-related matters. At the end of the meeting Gross handed the application to Myrick and asked him if it was all right and how long he would keep it on file. Myrick said that he wasn’t going to look at it and would just file it and put it away because he wasn’t interested in hiring.<sup>7</sup> According to Hamilton the discussion of Gross’ application was very brief in relation to the thrust of the meeting which was focused on the Union’s attempt to offer concessions and persuade Myrick to seriously consider becoming a signatory contractor.

William Hansen applied for employment on December 28, together with Dominic Paz. They filled out applications and were interviewed separately by Glen Myrick. Hansen testified that during the interview process Myrick asked Hansen if he was affiliated with the Union, and Myrick answered, “Does it matter. I came down here to do work. I need a job.” Myrick replied that Al Gross, a gentleman from IBEW Local 640, had come in the day before and Myrick showed Hansen a union T-shirt and a pamphlet that Gross had given him. Myrick said that he did not hire Gross, and asked “in a round about way” whether Hansen knew Gross. Hansen replied that Gross “had approached me from time to time to go to work with different

<sup>6</sup> There is conflicting record evidence regarding the date of this conversation, but it appears from the credible record evidence that the conversation was on or about December 29.

<sup>7</sup> Later during his testimony, Hamilton stated that Myrick replied he would keep the application, “Forever. I’m going to file it, I’m not going to look at it.”

Union shops.” Myrick said, “[O]kay, fine” and told him to report to work the next morning.

Paz was sitting about 10 feet away at the time and overheard Hansen’s interview with Myrick. According to Paz, Hansen noticed the union T-shirt in the office and asked Myrick about it. Myrick stated that Al Gross had been there recently and had left the T-shirt and some union materials. Myrick then asked whether Hansen was a union member or had any union affiliation, and Hansen replied that in the past he had been with Local 640 and had worked out of the union hall and asked, “[I]f there was a problem with that and would that make a difference in him getting the job.” Paz assumed that it made no difference, as Hansen was immediately hired as was Paz after Hansen told Myrick that Paz would make a good hand. Myrick instructed both Hansen and Paz to report to the superintendent, Rick Carter, at the AT&T jobsite the next morning.

Hansen estimated that there were about 18 union electricians on the job. He testified that during the first 2 weeks of his employment he was drilled over and over again by his foreman, Bob Orsburn, “if I was Union or not.” Orsburn, according to Hansen, said that his work was too good to not be a union electrician. Hansen said, “Does it matter. I’m here to do a job and I did my job.” Nevertheless, he continued to be “drilled every day or two about being Union.” One Monday morning in early January, Hansen overheard Orsburn say to Andrew Perata, another foreman or leadman under Orsburn, “We got rid of those fucking union pukes on Friday.” Hansen spoke up and asked, “What did you say,” and Orsburn repeated, “You heard me. We got rid of those fucking Union pukes.” Perata then said to another electrician, Lisa Lee, who happened to be working next to Hansen, that “[y]eah, we got Long Hair [Michael Viscardi]. We don’t have to put up with him anymore telling you what to do.” Thereafter Orsburn “kept after” Hansen all the time and, according to Hansen, the following scenario would occur every day: Orsburn would say to him, “If I find out you’re Union you’re gone . . . your work is too good, obviously you’ve got to be a Union member.” Hansen would then ask, “does it matter,” and Orsburn would then reply, “Well, obviously if you were Union I’ve got to get rid of you, I’ve got to let you go.”<sup>8</sup>

Paz testified that he had sustained a foot injury and was off work for a few days. When he came back to work he noticed that some electricians were no longer working. He and Hansen and Jim Zoske and Orsburn and Perata were standing there talking in the morning at the beginning of the shift as they were preparing for the day’s work, and there was some discussion about where the guys were. Either Orsburn or Perata, according to Paz, said that “those guys are gone. They were union guys, we got rid of some union pukes.” Shortly thereafter Perata came over to where Paz and Lee were working, and Lee asked where Viscardi was. Perata told her that, “we got rid of him, he was a union puke and we got rid of him. They were let go Friday.” According to Paz, Hansen was nearby, but not “directly” present during this second conversation.

<sup>8</sup> Apparently this latter testimony came as a surprise to the General Counsel, and the complaint was amended to include such alleged remarks by Orsburn as additional instances of threats and interrogation.

In about mid-January certain union members, including Paz and Hansen, began wearing union T-shirts and union hats to work. After they put on their T-shirts supervisors and managers left them alone, and Paz testified that Hansen was made a leadman on his crew sometime thereafter. On January 31 there was a 1-day strike in which he and Hansen and others participated.

Terrell Hyatt applied for work on December 30 pursuant to the instructions of Gross. Hyatt, wearing a union shirt and union hat, walked in the office and asked to speak to the person doing the hiring, and testified that, “I then told him that I was with the Local Union and intended to gain employment at that point in time.” The individual, who appeared to be acting as a messenger relaying information, went into the back room and, on returning, said that the hiring had been done over the weekend, that all positions were filled, and that they were not looking for any more people. Hyatt asked if he could fill out an application, and he was given an application to fill out and, on completing the application, asked the individual to staple Gross’ union business card to it because Gross had instructed Hyatt to inform the Respondent that he had been sent by Gross. Hyatt denied that he slammed the door when he entered the Respondent’s premises, that he spoke in a loud tone of voice, or that he that slammed his hand on the table as he was presenting Gross’ business card to the individual with whom he spoke.

Glen Myrick is the owner and general manager of the Respondent. Myrick testified that at times material here about 50 electricians worked on the AT&T project in Mesa, but the number would increase or decrease according to the work schedule. Rick Carter is the field and project superintendent. There are six or seven or eight foremen on the project and Bob Orsburn is one of the foremen. He oversees as many as 30 electricians on the job, helps them lay out their work, appoints them to do specific jobs at specific times, helps them get started, and insures that they have the necessary materials. Orsburn reports to Chuck Van Hook, and Van Hook reports to Carter. Orsburn has no authority to hire or fire, lay off, or grant time off, and may not take such action on his own. The Respondent does have supervisors meetings, and Orsburn attends such meetings but leadmen who are under Orsburn do not attend.<sup>9</sup> Perata has less authority than Orsburn.

Myrick testified that during December and January the Respondent needed electricians and did not care whether or not they were affiliated with any union. Thus, according to Myrick, three or four people came in and announced that they were union members or were affiliated with Local 640, and he hired them because he had confidence in their ability as union electricians. He hired employee Tom Biakiddy, James Zoske,<sup>10</sup> and Michael Viscardi, all of whom stated that they were union members and had union experience. Regarding Viscardi, he recalled that Viscardi told him that he had worked out of a local

<sup>9</sup> Myrick was not asked what matters were discussed at such meetings.

<sup>10</sup> Zoske’s application shows that he was hired on about November 1, and his resume shows that he has been a journeyman wireman for many years and completed the union apprenticeship program for electrical construction.

in California and was tired of living out of town, and Myrick told him, "You've got a job."<sup>11</sup> Myrick specifically testified that he did not interrogate any applicant for employment about his or her union affiliation.

Myrick testified that Al Gross did not come to his office for the purpose of applying for a job and did not, in fact, apply for a job. Gross, according to Myrick, came to the office about December 28 or 29, together with Hamilton. Myrick said, "May I help you," and Gross stated that he was Al Gross from Local 640 and that, "I'm here to fill out an application." This caught Myrick off guard and Myrick simply pointed to the counter where the applications are kept on a clipboard. Gross started talking about the benefits of the Union and what the Union could do for the Respondent, and at the same time began filling out the application. According to Myrick, Gross probably had only completed the name and address portion of the application, "And then the rest of the time we probably talked for 45 minutes to an hour." At first there was some tension, but after that the meeting was cordial and at the end of the conversation they all shook hands and Gross and Hamilton left. According to Myrick, Gross never asked for a job during the remainder of the conversation, and never even finished completing the application. During the conversation Gross said that there were about 15 members of Local 640 working on the AT&T job at the time. He gave Myrick an IBEW packet of some 50 pages titled "New Member's Kit," a T-shirt, and possibly a hat. There were a few jokes told and there was some laughter during the conversation. Myrick never told Gross that he would not give him an application, or that he would keep his application forever and not review it or look at it, and, according to Myrick, Gross never asked for a job after his introductory remark that he was there to fill out an application.<sup>12</sup>

Myrick testified that he did look at the application after Gross and Hamilton left, took it out of the clipboard, saw that it had Gross' name and address on it, and threw it away as he did not attach any significance to it.

Michael Wright is Myrick's brother. Wright corroborated the testimony of Myrick. Wright came out and joined the group shortly after he heard Gross say, "My name is Al Gross and I'm here to organize your place of business." As he came out from the back office he observed Gross commence to fill out an application. Then Gross stopped filling out the application and began explaining the benefits of the Union. They talked about estimating jobs, and the ways that the Union could help the Respondent compete with nonunion employers by adsorbing some of the costs, and they talked about "old times and things." Neither Wright nor Myrick said anything about a gun, or told Gross that they were not hiring at the time or that all positions were filled. Gross did not completely fill out his application, and as the conversation progressed Gross did not

seem interested at all in actually applying for a job. Myrick did not say that he would not look at Gross' application or that the application would be on file forever.

Regarding his job interview with Hansen in approximately mid-December, Myrick testified that it developed into a cordial conversation. Hansen said that he knew Myrick's cousin, Greg, and had taught Greg some work-related things. This caused Myrick to ask if he knew his uncle, Uncle Walt, and Hansen said yes. Hansen then told him that he was a member of Local 640 and had been an electrician for 30 years. On hearing this Myrick hired him, as he believed that he was certainly qualified for the job. Thus, Myrick did not ask him about his union membership; rather, Hansen volunteered this information.

Regarding the December 30 incident with Terrell Hyatt, Myrick testified that his office is close to the front door of the building and he heard the door open and slam and the building rattle as the building is a metal building and the slamming of the door will have this effect. David Dondero, an excavation crew supervisor and Myrick's stepson who happened to be in the office at the time, walked up to the front desk and Myrick heard Hyatt demand to see the man who does the hiring and also demand an employment application. Dondero gave him the application, and Hyatt filled it out. Dondero then stated, according to Myrick, that he was not sure whether they were hiring, and Hyatt "slammed a card down on the table hard enough on top of his application," and said, "This man told me to come in here, that you would give me a job." Dondero said, "I can't help that," and Hyatt slammed the door on his way out. Myrick testified that Hyatt was not considered for employment because, "With an attitude like that we don't want people like that on our team."

Dondero generally corroborated the testimony of Myrick and further testified that when Hyatt had completed his application he "yelled" for Dondero, who was in the next room, and said in a very loud and disruptive voice, "I'm through with my application." Dondero came back out and said he would give the application to the field superintendent, and Hyatt "slapped a card down" and said, "I was told to come here to get a job, that I would be hired." Then he left, slamming the door behind him. After Hyatt left, Myrick asked Dondero what that was all about, and Dondero told him that he couldn't believe that someone looking for a job would come in acting so arrogant and disruptive.<sup>13</sup>

Myrick testified in detail as to the benefits of having Crown Technical electricians working for the Respondent. Even though employing electricians in this fashion is somewhat more costly, he has been utilizing the services of Crown Technical for at least 4 or 5 years. The benefits include being able to get qualified people at a moment's notice, avoiding all of the book-keeping and paperwork involved in hiring and dealing with employees, and delaying the payment of wages for a period of months during which time the Respondent is, in effect, being indirectly financed by Crown Technical.

<sup>11</sup> Katherine Bower, Respondent's bookkeeper, testified that she was in the office when employee Thomas Picardi applied for a job. He said, "I'm here to apply for a job, Local Union 640 had sent me here to apply for a job." Bower gave him the application and he filled it out. He was hired and is still working for the Respondent.

<sup>12</sup> Myrick, in his Board affidavit, states, "I consider this filling [sic] application only an excuse for an ice breaker in order to speak with us about the union."

<sup>13</sup> Wright was also in the office on December 30, at the time Hyatt applied for employment. His testimony regarding this matter is consistent with the foregoing testimony of Myrick and Dondero.

Katherine Bower, a bookkeeper, has been employed by the Respondent since August 13. Bower testified that during September she had been instructed by Wright to prepare an updated application form for use by the Respondent, and included a question asking for the applicant's union affiliation, if any.<sup>14</sup> She presented the form to Wright for his approval, and was told that this question could not be asked and the form could not be used.<sup>15</sup> She believed that she had discarded the prototype form but, according to Bower, one form containing this question was inadvertently given to applicant Elias Jaime on January 4. The General Counsel was presented with Jaime's application, in addition to approximately 134 additional applications dated both before and after January 4, pursuant to a subpoena duces tecum served on the Respondent. According to Bower, this was the only application containing the inappropriate question. As a result of this, the General Counsel amended the complaint to include an additional 8(a)(1) allegation that the question asked Jaime constituted unlawful interrogation.

Andrew Perata, a foreman, testified that he never stated to any employees that Viscardi had been laid off because he was a union puke, or punk, or fuck. Perata's father is in the Union, he has five uncles who are in the Union, and he is not antiunion. Perata testified that he did not make any threats to employees concerning their membership in or support of the Union, and he did not interrogate anyone about their union membership or support.

Orsburn testified that he is a foreman, and that Perata and three other foremen work under him. Orsburn denied that he stated to anyone, in response to a question regarding the whereabouts of Viscardi, that, "we got rid of those union pukes," or words to that effect. He did not ever refer to employees who had been laid off as union pukes, punks, or fucks. He did know that there were union people on the job, in particular, Jim Zoske, Tom Biakiddy, and Mike Benson because he worked with all of these individuals and they told him that they were union members. Orsburn testified that he did not work on the night shift and left work at 3 p.m. each day, and that he was not and could not have been present during a conversation on the evening of January 5 near the J-John when potential layoffs were allegedly discussed. In fact, he was not certain that there were going to be any layoffs, although he knew that this was a possibility due to the elimination of the night shift.

#### *B. Analysis and Conclusions*

I credit the testimony of Carter, Van Hook, and Myrick and find that the January 5 layoff of six employees was motivated by lawful business considerations, namely the elimination of the night shift and the resultant combining of the two shifts into 1-day shift. There is abundant record evidence showing that the Respondent did indeed combine the two shifts after completing phase one of the project, and that it did not need as many employees for one shift only; therefore this provided the Respondent with an opportunity to select the least desirable employees

for layoff. The record evidence does not support the General Counsel's contention that the layoff was a "sham" designed to eliminate union members.

I find that the six individuals were selected for layoff for the specific reasons given by Carter and Van Hook as these six employees were the least productive, the most expendable, or exhibited other traits or characteristics that warranted their removal.<sup>16</sup> Under these circumstances, the fact that they were not given work on other jobs and that new employees were hired a week or so later is immaterial. It is significant that the group of six included only three union members. Moreover, it is clear that Viscardi exhibited a very biased opinion toward the Crown Technical employees under his direction, believed they were incompetent "rent-a-drunks," and treated them accordingly. Clearly the Respondent would not want to retain an employee, whether a leadman or not, who harbored such a negative opinion of his fellow employees with whom he must work and cooperate on a daily basis; and insofar as the record shows the electricians sent out by Crown Technical were performing their work in a satisfactory manner and the Respondent, having utilized the services of Crown Technical for a number of years, must have been pleased with the services provided. Regarding Chamberlain, it is significant that he did not deny that he was snooping around inside the Respondent's trailer or offer any explanation for this behavior, and certainly it is reasonable that the Respondent would select a person exhibiting this type of behavior to be among the first to be laid off. Lastly, with regard to Nobles, it is significant that Chamberlain did not corroborate Nobles' assertion that Van Hook declared Noble's work to be "fine." And I have previously credited Carter's testimony, corroborated by Van Hook, that Nobles was selected for layoff because he was very slow and his efficiency did not seem to justify the amount of money that he was being paid. Accordingly, I find that Viscardi, Chamberlain, and Nobles were selected for layoff for lawful business-related considerations and that they were not laid off in violation of Section 8(a)(3) of the Act as alleged.

I do not credit the testimony of Hansen or Paz. I find that during Hansen's employment interview Myrick, whom I credit, did not ask him if he was affiliated with the Union. Indeed, it would not have made any difference, as there is abundant record evidence that Myrick simply did not care whether the applicants were union or not and in fact believed the experienced union applicants warranted a higher rate of pay. Further, I do not credit the testimony of Hansen or Paz regarding the remarks they attributed to Perata and Orsburn about union pukes or that certain employees were laid off because they were union pukes or words to that effect. The testimony of Hansen and Paz was not corroborated by other witnesses to such conversations, namely Zoske, an active union member who did not testify in this proceeding, and Lee, who testified that neither Orsburn nor Perata made such statements in her presence. In addition, other witness called by the General Counsel testified that Orsburn was reticent about such matters, and, when asked,

<sup>14</sup> The question is: "ARE YOU CURRENTLY AFFILIATED WITH ANY LABOR ORGANIZATION OR UNION? IF YES, WHICH ORGANIZATION OR LOCAL UNION?"

<sup>15</sup> Wright corroborated this testimony of Bower.

<sup>16</sup> Both Carter and Van Hook impressed me as "no nonsense" superintendents who were only interested in getting the job done in the most efficient manner; I credit their testimony.

would only acknowledge that he knew that union members were working on the job but would not say anything negative about them. Indeed, Orsburn admitted this, as he was very much aware that several of the electricians on the job with whom he was friendly were union members. It is also significant that, according to one of the General Counsel's witnesses, the "union pukes" statement was used not by any of the Respondent's foremen, but rather by the superintendent of Caliente, the general contractor. Moreover, Hansen's uncorroborated testimony that he would be confronted by Orsburn every day with the mantra to the effect that his work was too good, that therefore he must be union, and that if it turned out that he was indeed union Orsburn must get rid of him seems preposterous and inherently implausible and I discredit it.

Regarding Nobles' testimony that on the evening of January 5 Orsburn was among a group of individuals during which it was stated that "they were going to have a layoff that night and they were getting rid of some union people," it is significant that Orsburn could not have been present during the alleged conversation during the night shift as he was not even at the jobsite. Accordingly, I do not credit this testimony of Nobles. Finally, I conclude that both Preata and Orsburn were forthright witnesses, and both impressed me as credible individuals. I shall dismiss those allegations of the complaint regarding interrogation by Myrick and threats and interrogation by Perata and Orsburn and statements by them that individuals were to be laid off because they were union.<sup>17</sup>

I credit Myrick and find that Gross was not initially told by Myrick that he would not be given an employment application. Rather, I find that Gross was immediately provided with an application and began filling it out. I credit both Myrick and Wright that Gross did not thereafter refer to the application or to his seeking employment, but directed the conversation to other union-related matters specified above which need not be reiterated here. The conversation was lengthy and, after the first few moments, which were somewhat strained due to the circumstances, the remainder of the conversation was very cordial. Under these circumstances it would have been very incongruous for Myrick to end the conversation by sarcastically stating that he would not even look at Gross' application and would keep it on file "forever." Even if this was indeed his intent it does not seem plausible that he would have said so, as the alleged remark was in the nature of a confrontational comment that would have invited some less-than-amicable response. I credit Myrick and Wright and find that Myrick made no such statement, that Gross did not again refer to the application, that everyone shook hands, and that they were left with the impression, eminently reasonable under the circumstances, that Gross' initial request for the employment application was simply a vehicle utilized by Gross to initiate a conversation about other matters; thus, they believed as a result of what transpired

after the first moments of the conversation that Gross was not really interested in employment. I do not credit the testimony of Gross and Hamilton to the extent that it is inconsistent with the testimony of Myrick and Wright. I shall dismiss this allegation of the complaint.

I credit the testimony of Dondero, Myrick, and Wright, which need not be reiterated here, and find that Hyatt, when he applied for work, was unduly loud, disrespectful, arrogant, and demanding to the point that any reasonable employer would not hire such a personality. Indeed, Hyatt testified that he entered the premises and exclaimed that, "I was with the Local Union and *intended* to gain employment at that point in time." Clearly, such a statement, in the nature of a demand for employment, would not be favorably received by any prospective employer. I find that Hyatt was denied employment because of his attitude rather than because of his union affiliation. I shall dismiss this allegation of the complaint.

I find that the single employment application containing a question regarding union affiliation is insufficient to warrant the finding of a violation. I credit Wright and Bower and find that this was the only application of its kind, that it was inadvertently included among other valid applications, which did not contain such a question, and that the approximately 134 applications furnished to the General Counsel did not contain this question.<sup>18</sup> Further, I conclude that Bower and Wright have diligently attempted to comply with the General Counsel's subpoena duces tecum, and have been unable to locate any other employment applications. I shall dismiss this allegation of the complaint.

Finally, I find that the strike or picketing that occurred on about January 31 was not an unfair labor practice strike as alleged.

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has not violated Section 8(a)(1) and (3) of the Act as alleged.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>19</sup>

#### ORDER

The complaint is dismissed in its entirety.

<sup>18</sup> However, I do not find that the reason given by Bower for inserting the question in the application in the first instance is convincing.

<sup>19</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>17</sup> Under these circumstances it makes no difference whether Orsburn or Perata are supervisors as alleged.